NO. 80-581

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

* * *

COMMONWEALTH EDISON COMPANY, et al.,
Appellants,

v.

STATE OF MONTANA, et al.,
Appellees.

* * *

ON APPEAL FROM THE
SUPREME COURT OF THE STATE OF
MONTANA

* * *

BRIEF AMICUS CURIAE OF THE STATE OF TEXAS

* * *

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THE INTEREST OF TEXAS

The interest of the State of Texas in the Montana coal severance tax can be expressed in several contexts. First, utilities serving Texas consumers are committed to purchase Montana coal. The City of Austin, for example, will be burning large amounts of the coal in its electric generating facilities. The Fayette I facility, to be operated by Austin and the Lower Colorado River Authority, will purchase fifty million tons of Montana

coal during the twenty-five year term of its contract with Decker Coal Company. Houston Lighting & Power will purchase 176 million tons of Montana coal for use in its own facilities. The interests of the state and its citizens, as consumers and ratepayers of electricity produced from the combustion of that coal, are greatly affected by the tax and consequent cost of the coal.[1] Texas' concern in this regard is not limited to disfavoring a net transfer of wealth from its citizens to the Montana treasury. We are concerned that the artificial added cost of energy imposed by the tax will either prevent new industries from developing in Texas or encourage existing industry to leave the state in order to find cheaper energy elsewhere.

Second, Texas fears that if the Montana tax is allowed to stand, other coal producing states will raise their tax structures to the Montana level. Such a result would subject most of the coal consumed in Texas to the tax Consumers would have few alternatives. They could look abroad for competing sources of coal, or they could suffer the consequences of decreased energy production.

[1] Because of Texas' long reliance on its natural gas and petroleum, and because it lacks substantial deposits of high-quality coal, the shift to increased coal use will be far more difficult and costly for Texas than for other areas of the country. Based upon a United States Department of Energy Study, "Analysis of Proposed U. S. Department of Energy Regulations Implementing the Powerplant and Industrial Fuel Use Act" (November 1978), approximately one-half of national conversion costs associated with the Powerplant and Industrial Fuel Use Ace will be borne in Texas. Texas concerns involve, in part, exacerbation of those conversion costs by the additional tax burden exacted.

Third, the high level of the Montana tax could spur other states to tax their own resources accordingly. Some states would be encouraged to discover new sources of tax revenues from goods sold upon the national economy. Other states may simply tax old sources at new rates. As a sovereign state exacting severance taxes of its own,[2] Texas does not dispute the right of states to levy severance taxes and other measures long held to be valid -- and necessary -- acts of sovereignty. As this Court has noted, so long as states do not abridge the Constitution they possess a wide latitude of discretion to impose taxes to support the general welfare of the state. *See Southwestern Oil Company v. Texas*, 217 U.S. 114 (1910).

Although Texas supports the rights of states to levy appropriate tax measures, and does not oppose Montana's right to impose a coal severance tax *per se*,[3] we believe that the particular tax subject to this Court's review is inconsistent with our system of federalism. If Texas were autonomous, it would use its own energy resources for domestic purposes and export the

[2] Texas collects a severance tax of 4.6% of value of oil produced and 7.5% of value of natural gas produced within the state.

[3] Texas defends the rights of states to enact appropriate taxes upon the activity of severing minerals from the state. Mineral extraction imposes many economic, environmental and social costs upon a state while requiring the state to provide additional services. A severance tax is a means of imposing those costs upon those benefiting from the activity. Texas wishes to make clear that it is not the concept of a coal severance tax which is being challenged, but the excessive *rate* of this particular tax.

remainder at the price level of the world market.[4] Texas would not need Montana coal. As shown below, however, a federal program prevents Texas from acting as its own interests otherwise would dictate. Texas does need Montana coal. The Constitution prevents any state from inordinately benefiting from such a federal response to a national problem; the Montana tax should be declared invalid.

SUMMARY OF ARGUMENT

The Congress has enacted a national energy policy designed to substitute the use of coal and other more abundant resources for the use of increasingly scarce oil and natural gas. The Montana coal severance tax stands as a substantial obstacle to the attainment of the national objective. By frustrating the statutes of Congress, the Montana tax is preempted and should be declared invalid.

THE OBJECTIVES OF CONGRESS

No single issue has received more public attention in the past few years than our nation's energy problem. This critical subject repeatedly has been singled out by the last three Presidents as crucial to our nation's future. As stated by President Carter in his April 18, 1977, Presidential Energy Address:

[4] As presented in our brief supporting the jurisdictional statement of appellants, a variety of federal statutes control the price, production, and allocation of oil and natural gas produced in Texas. *See* e.g., the Emergency Petroleum Allocation Act of 1973 (Pub.L. 93-511, 88 Stat. 1608); the Energy Supply and Environmental Coordination Act of 1974 (Pub.L. 93-319, 88 Stat. 246); the Energy Policy and Conservation Act of 1976 (Pub.L. 94-163, 89 Stat. 871). Natural Gas Policy Act of 1978, Pub.L. 95-621 (1978).

> Tonight I want to have an unpleasant talk with you about a problem that is unprecedented in our history. With the exception of preventing war, this is the greatest challenge that our country will face during our lifetime. The energy crisis has not yet overwhelmed us, but it will if we do not act quickly.

Presidential Energy Address (April 18, 1977), reported in 1 EN. MNGM'T (CCH) Para. 731.

We realize that we must decrease our dependency on and use of foreign oil. Our response is, and has been, to substitute wherever possible alternate energy sources. The most practical alternative is coal.

The past three Presidents have called for greatly expanded use of coal. In 1973 President Nixon addressed the subject in a special message to Congress.

> *Coal*
>
> Coal is our most abundant and least costly domestic source of energy. Nevertheless, at a time when energy shortages loom on the horizon, coal provides less than 20 percent of our energy demands, and there is serious danger that its use will be reduced even further. If this reduction occurs, we would have to increase our oil imports rapidly, with all the trade and security problems this would entail.
>
> *I urge that highest national priority be given to expanded development and utilization of our coal resources.* Present and potential users who are able to choose among energy sources should consider the national interest as they make their choice. Each decision against coal increases petroleum or gas consumption, compromising our national self-sufficiency and raising the cost of meeting our energy needs....
>
> As an additional measure to increase the production and use of coal, I am directing that a

> new reporting system on national coal production be instituted within the Department of the Interior, and I am asking the Federal Power Commission for regular reports on the use of coal by utilities. (Emphasis added.)

President Nixon's Energy Message to Congress, 9 WEEKLY COMP. OF PRES. DOC. 389-406 (April 23, 1973).

Little more than six months after Mr. Nixon's message, the nation was in an energy crisis. The President focused on the critical situation in an address to the nation, making the following remarks:

> I want to talk to you tonight (November 7, 1973) about a serious energy problem we must all face together in the months and years ahead.
>
> As America has grown and prospered in recent years, our energy demands have begun to exceed available supplies. In recent months we have taken many actions to increase supplies and reduce consumption. But even with our best efforts, we knew that a period of temporary shortages was inevitable. . . .
>
> We must therefore face up to the stark fact that we are heading toward the most acute shortages of energy since World War II. Our supply of petroleum this winter will be at least 10 percent short of our anticipated demands -- and could fall short by as much as 17 percent.
>
> Even before war broke out in the Middle East, these prospective shortages were the subject of intensive discussions among members of my Administration and leaders of Congress, Governors, mayors, consumers and industrial representatives. From these discussions has emerged a broad agreement that we must now set out upon a new course for our Nation.

> In the short run, this course means that we must use less energy -- less heat, less electricity, and less gasoline. In the long run, it means that we must develop new sources of energy which give us the capacity to meet our needs without relying upon foreign nations. . . .
>
> We must be sure that our most vital needs are met first -- and that our least important activities are the first to be cut back. And we must be sure that while the fat from our economy is being trimmed, the muscle is not seriously damaged.
>
> Immediate steps. -- *First, I am directing that industries and utilities which use coal -- our most abundant resource -- be prevented from converting to oil in the immediate future. Efforts will also be made to convert power plants from the use of oil to the use of coal.* (Emphasis added.)

Text of an address by the President on the energy crisis, as reported in 1 EN. MNGM'T (CCH) Paras.549, 550.

The Arab oil embargo thus propelled coal to a position of paramount importance in the federal scheme of energy independence. Coal was to become even more important in the coming years.

Within eleven months, a new Administration proposed a policy to require use of coal and nuclear energy for new electric generating facilities and for the conversion of existing plants. White House Fact Sheet, "A Program to Control Inflation in a Healthy and Growing Economy," October 8, 1974, as reported in 1 EN. MNGM'T (CCH) Para 657. Several months later, President Ford's first State of the Union address demonstrated that adjustments would be necessary -- and coming -- to facilitate the increased use of coal:

> Use of our most abundant domestic resource --coal-- is severely limited. We must strike a reasonalbe compromise on environmental concerns with coal. I am submitting Clean Air

> Act amendment which will allow greater coal use without sacrificing our clean air goals . . . .
>
> I vetoed the strip mining legislation passed by the last Congress. With appropriate changes, I will sign a revised version into law.

1 EN. MNGM'T (CCH) Para. 691.

Additionally, in a White House Fact Sheet accompanying the address, the Administration stated:

> Actions to achieve the above national energy goals must be based upon the following principles:
>
> --Provide energy to the American consumer at the lowest possible cost consistent with our need for secure energy supplies.
>
> --Make energy decisions consistent with our overall economic goals.
>
> --Balance environmental goals with energy requirements.
>
> --Rely upon the private sector and market forces as the most efficient means of achieving the Nation's goals, but act through the government where the private sector is unable to achieve our goals.
>
> --Seek equity among all our citizens in sharing of benefits and costs of our energy program.
>
> --Coordinate our energy policies with those of other consuming nations to promote interdependence, as well as independence.

Id., Para. 693, White House Fact Sheet on the President's State of the Union Message, January 15, 1975.

In his second State of the Nation speech, the President reaffirmed the need for a strong coal policy to discourage the use of oil and natural gas. *Id*, Para. 606.

Finally, President Carter continued the chain of presidential proclamations urging increased use of coal to reduce our dependence on imported oil.

> Some believe that we should not continue or expand the use of coal and others have the same view about nucleur energy. But a careful look indicates that we do not have a *choice* between increasing the use of coal or nuclear energy. Instead, we must increase the use of *both* coal and nuclear energy until more acceptable alternate energy sources are available. Even with strong efforts to conserve energy, and increased efforts to produce domestic oil and natural gas, we must increase the use of both coal and nuclear energy if we are to meet the demands for energy for a growing economy. The only alternative is to increase our growing dependence on imported oil.

Id., Para. 711, Presidential Energy Message to Congress, January 7, 1977.

Additionally, to encourage further utilization of coal the President proposed a tax on the use of oil and natural gas in industrial facilities. "Although coal now provides only 18 percent of our total energy needs, it makes up 90 percent of our energy resources. . . . To increase the use of coal by 400 million tons or about 65 percent. . . I propose a sliding scale tax. . . on large industrial users of oil and natural gas." *Id.*, Para. 739, President Carter's Energy Message to Congress, April 20, 1977.

Against this background of presidential pronouncements, Congress has expressed a strong purpose to further the immediate and long term interests of the nation by the establishment of a federal scheme designed to increase the use of coal in lieu of

alternative energy sources. That purpose is most centrally expressed in Section 102 of the Fuel Use Act.[2]

> (a) Findings.--The Congress finds that--
>
> (1) the protection of public health and welfare, the preservation of national security, and the regulation of interstate commerce require the establishment of a program for the expanded use, consistent with applicable environmental requirements, of coal and other alternate fuels as primary energy sources for existing and new electric powerplants and major fuelburning installations; and
>
> (2) the purposes of this Act are furthered in cases in which coal or other alternate fuels are used by electric powerplants and major fuel-burning installations, consistent with applicable environmental requirements, as primary energy sources in lieu of natural gas or petroleum.
>
> (b) Statement of Purposes.--The purpose of this Act, which shall be carried out in a manner consistent with applicable environmental requirements, are--
>
> (1) to reduce the importation of petroleum and increase the Nation's capability to use indigenous energy resources of the United States to the extent such reduction and use further the goal of national energy self-sufficiency and otherwise are in the best interests of the United States;
>
> (2) to conserve natural gas and petroleum for uses, other than electric utility or other industrial or commercial generation of steam or

[5] Powerplant and Industrial Fuel Use Act, Pub.L. 95-620, 92 Stat. 3289 (1978).

electricity, for which there are no feasible alternative fuels or raw material substitutes;

(3) to encourage and foster the greater use of coal and other alternate fuels, in lieu of natural gas and petroleum, as a primary energy source;

(4) to the extent permitted by this Act, to encourage the use of synthetic gas derived from coal or other alternate fuels;

(5) to encourage the rehabilitation and upgrading of railroad service and equipment necessary to transport coal to regions or States which can use coal in greater quantities;

(6) to prohibit or, as appropriate, minimize the use of natural gas and petroleum as a primary energy source and to conserve such gas and petroleum for the benefit of present and future generations;

(7) to encourage the modernization or replacement of existing and new electric powerplants and major fuel-burning installations which utilize natural gas or petroleum as a primary energy source and which cannot utilize coal or other alternate fuels where to do so furthers the conservation of natural gas and petroleum;

(8) to require that existing and new electric powerplants and major fuel-burning installations which utilize natural gas, petroleum, or coal or other alternate fuels pursuant to this Act comply with applicable environmental requirements;

(9) to insure that all Federal agencies utilize their authorities fully in furtherance of the purposes of this Act by carrying out programs designed to prohibit or discourage the use of natural gas and petroleum as a primary energy source and by taking such actions as lie within their authorities to maximize the efficient use of energy and conserve natural gas and

petroleum in programs funded or carried out by such agencies;

(10) to insure that adequate supplies of natural gas are available for essential agricultural uses (including crop drying, seed drying, irrigation, fertilizer production, and production of essential fertilezer ingredients for such uses);

(11) to reduce the vulnerability of the United States to energy supply interruptions; and

(12) to regulate interstate commerce.

The purpose of Congress is clear; it wishes to further the attainment of the enumerated goals by decreasing the use of petroleum and natural gas as a boiler fuel. In their place, Congress would have the nation use coal.

The Fuel Use Act prohibits new electric powerplants from using oil or natural gas as a primary fuel source and prohibits the use of natural gas in existing facilities after 1989. Further, unless natural gas was used as a primary source during 1977, its use is banned before the January 1, 1990, deadline; plants meeting the 1977 usage exception are limited to their historical consumption. Exemptions from the regulations will be granted only in certain limited circumstances.

PREEMPTION

In *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978), this Court noted that "[e]ven if Congress has not completely foreclosed state legislation in a particular area, a state statute is void to the extent that it actually conflicts with a valid federal statute." Such conflict may occur "where the state 'law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress' [citing *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)]." *Id.* The Montana courts erred in rejecting this standard. The courts looked for an express congressional intent to prohibit a severance tax on coal. Under the *Hines v. Davidowitz* standard,

however, such express intent is not required. "Any state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell*, 412 U.S. 637, 652 (1971). A head-on conflict with a federal statute is unnecessary; preemption will occur where the state enactment impairs or frustrates the purpose of Congress. *See Malone v. White Motor Corp.*, 435 U.S. 497 (1978).

The preemption standard, in summary, is not limited to a consideration of whether Congress "so occupied the field" such that state taxation is precluded, or whether Congress specifically prohibited state coal severance taxes. *See Ray v. Atlantic Richfield, supra.* The question, rather, is whether the thirty percent tax on coal frustrates and impairs the objectives of Congress in enacting its national energy policy.

FRUSTRATION OF THE NATIONAL PURPOSE

It is apparent from presidential statements and congressional action that there is a clear and definite federal scheme favoring increased use of coal in lieu of other energy sources. It is equally clear that the tax, insofar as it exacts an exorbitant surcharge for the use of Montana coal, serves to frustrate and impair the federal scheme and the express purpose of Congress to increase coal use.

For Texas and perhaps most of the West, western coal is as a practical matter the only coal available for use. Texas would show at trial on the merits that the high cost of transportation of eastern coal to Texas precludes its use. The use of coal from the Midwest is a break-even proposition only at Texas cities served by barge. When the added costs of inland rail transportation from dock to generating plants are added to the costs of pollution and pollution control for the higher sulphur content of midwestern coal, western coal is seen as being the only feasible alternative to the use of petroleum.

The thirty percent coal tax frustrates the use of western coal. In enacting its energy plan, the Congress

considered the effects of taxes on energy consumption. A bill was introduced, (Title II of H.R. 6831; 95th Cong., lst Sess.) to provide

> incentives to cut down energy consumption in the United States and to convert from the use of oil and gas to coal, nuclear power, and other more abundant energy sources. The bill raises taxes on many users of energy, particularly in cases where conservation or conversion from oil and gas is relatively easy. The bill also provides tax incentives to both individuals and businesses for investments to conserve energy or to convert to oil and gas to other energy sources.

H.R. REP. No. 95-496, 95th CONG.., 2d Sess. 3 (1978).

In its report on the bill, the Committee on Ways and Means stated, *inter alia*, that

> urgency of the energy problem requires a special measure designed specifically to reduce the consumption of oil and natural gas by large industrial and utility users. The cost of oil to these users must be raised to reflect the growing threat which unchecked oil imports pose to the security of the United States. The cost of natural gas must be raised because the existence of long-term regulated contracts has kept the price of natural gas below its replacement cost, thus encouraging too much consumption. At the same time, the revenue from the taxes used to achieve these cost increases should be employed to provide incentives for the purchase of new equipment which burns fuels other than oil or gas. The committee has therefore designed a combination of taxes and incentives which, it believes, will achieve a substantial reduction in oil and gas use.

Id at 94.

The Ways and Means Committee demonstrated its belief that one purpose of a tax on any specific type of energy is to decrease its use. On the other hand, tax reductions on a type of energy encourage the use of that energy type and further reduce the use of higher taxed energy sources. The coal tax effects a result opposite to that intended by Congress. The coal tax makes western coal more expensive which tends to reduce the consumption of coal relative to oil and gas, and thereby makes imported petroleum or natural gas more cost attractive.

Second, Congress has stated that the objectives of the Fuel Use Act were "to effect the conversion from natural gas and petroleum to coal or other domestic fuels to the greatest extent possible within reasonable economic and physical constraints." S.REP. No. 95-361, 95th CONG. 2d Sess. 37, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 8361. The potential benefits of attaining the objective of conversion to coal are many. An increase in the use of domestic energy sources will reduce the importation of foreign oil. National security will be enhanced by a lesser dependence on foreign energy sources. Further, the lowered demand for imported oil should reduce the price of the oil, or at least reduce the rate of increase in world oil prices. In turn, the United States' balance of payments will be positively affected, the value of the dollar will be strengthened, and there will be a corresponding downward pressure on the inflation rate.

The Montana tax, however, not only frustrates the objective of conversion, but contradicts the objective of promoting conversion "within reasonable economic and physical constraints." The tax increases costs of conversion to coal in derogation of the congressional purpose. Moreover, the increased cost to the purchaser does not have the countereffect of increasing producer revenues and thereby generating increased supply; the increased costs are paid as tax, not as an incentive as

contemplated by Congress, e.g. in the Natural Gas Policy Act of 1978, Pub. L. 95-621, providing for increased supplies of natural gas.

Finally, the Clean Air Act Amendments of 1977 demonstrate no intent by Congress to deviate from its clear policy of coal conversion. These amendments were initiated by certain congressmen from traditional coal producing states concerned that the demand for environmentally preferable, low-sulphur western coal would displace the demand for high-sulphur eastern and midwestern coal produced by their constituents. Rather than attempt to encourage the production of high-sulphur coal at the expense of western coal, Congress simply attempted to encourage eastern utilities to support their local mining industries by requiring all coal-fired plants to install certain pollution control devices. Apparently, Congress believed that if the high-sulphur coal were placed on an effective equal footing with low-sulphur western coal, coal production, employment and local economies in the East and Midwest would remain stable. Congress, in responding to political reality, evidenced no desire to retreat from its purpose of promoting coal conversion.

The Montana coal severance tax has the effect of contradicting, impairing and frustrating the attempts of Congress to meet the imperative energy problems facing this nation. Rather than reflecting the aims of Congress, the tax inhibits attainment of the goal of conserving large amounts of imported petroleum through conversion of electric generating facilities to the utilization of coal as a primary energy source. As the price of coal to the user increases, there will be a reduction in usage, to the effect that either other fuels such as oil and gas will be substituted, or there will be a net reduction in energy devoted to productive ends. Such a result is contrary to the federal scheme of energy priority and therefore not permitted by the Supremacy Clause.

As the foregoing demonstrates, the national energy policy attempts to reduce importation of foreign petroleum by promoting the increased use of coal. The State of Texas respectfully submits that the courts below have misconstrued the intent of the federal scheme and the need to determine whether the coal severance tax "stands as an obstacle to the accomplishment and execution of the full purposes of Congress." *Ray v. Atlantic Richfield, supra,* 435 U.S. at 158.

CONCLUSION

This Court long ago held that

> [t]he States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 436 (1819). The Constitution provides that in our balanced federal system, the Constitution and enactments of Congress shall be the supreme law of the land. Any state laws frustrating the intent of Congress shall be invalid.

The coal severance tax clearly conflicts with the imperative purpose expressed by Congress. Coal is made more expensive, which either lessens the conversion from oil and natural gas to coal, or reduces the utilization of domestic energy resources, impairing the economic health of this nation. The tax frustrates the avowed aims of Congress in dealing with perhaps the most critical concern of the remainder of this century. The Montana courts have erred in their construction of the federal scheme, the conflict between the tax and the laws of Congress, and the necessary standard to be applied in viewing the conflict.

Accordingly, the State of Texas respectfully requests that the decision of the Montana courts be reversed.

Respectfully submitted

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